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# Supreme Court of the United States

OCTOBER TERM, 1933.

No. 239.

HARTFORD ACCIDENT & INDEMNITY COMPANY AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS,

VS.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

## BRIEF OF APPELLANTS IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

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*Of Counsel for Appellants.*

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### POINT I.

Under this point appellee contends:

**In the judgment and opinion from which this appeal is sought there is not brought in question any constitutional right or privilege of appellants, but same turns alone upon nonfederal questions of local law and state procedure.**

With reference to Point One urged by appellee, this cause, it is submitted, can not be affirmed on the

theory that there is no federal question presented. The record in this cause amply demonstrates that the federal question was raised *eo limine* and consistently and persistently contended for and pursued.

The answer filed by the appellant, Hartford Accident & Indemnity Company, to the intervention of appellee specifically adopted the answer of said appellant to the original bill of complaint filed in the cause in which appellee intervened. (Transcript page 16, Transcript page 13, and also Transcript Cause 333, October Term, 1931, page 39, the Demurrer of the Hartford Accident & Indemnity Company to the Original Bill.)

Moreover, the most casual reading of the opinion of the Supreme Court of Mississippi in affirming the Chancery Court of Adams County, Mississippi, in the present cause, will show that the court based its affirmance upon its prior holding that the statute was constitutional as set out in 155 Miss. 31, 119 So. 366; 161 Miss. 198, 132 So. 535, and in 161 Miss. 222, 135 So. 497.

All of the opinions are before this court as a part of the record.

It is submitted that the various opinions of the Supreme Court of Mississippi upholding the constitutionality of the statute under attack can be read in vain for any statement either of fact or of law that will warrant the conclusion or the contention that the Supreme Court of Mississippi has decided this cause on any ground save the effect of the statute (Sec. 3, Chapter 128, Laws of 1918), whose constitutionality is attacked. In fact, the court flatly puts its decision purely on that statute and on its

constitutionality in face of the ever present contention of appellant that the statute was unconstitutional.

The bond sued on in this cause by appellee and others was so drawn that no suit could have been maintained on it by appellee except for the provisions of the statute. Appellee could not have opened the doors of the courts much less have stayed in court without the statute. The pleadings show that it relied upon the statute, successfully invoked, to aid and it cannot be heard to say now that the statute was not involved and not determinative of the issue. See Paragraph One, cross bill of appellee, pages 5 and 6 of the transcript.

## POINT II.

Under this point appellee contends:

**The judgments and opinions of the Supreme Court of Mississippi of dates February 23rd and June 15th, 1931 (No. 333, Tr. 67 and 86), were final within the meaning of the Judicial Code, Sec. 237, and when no appeal was perfected therefrom same became the law of the case and binding upon the parties hereto and upon the Mississippi courts in this cause.**

It is submitted that the judgments and opinions relied on by appellee under this head were not final within the meaning of the Judicial Code, Section 237.

Appellee's contention here is virtually a plea of *res adjudicata* and it is submitted that the dismissal of the prior appeal in this case (*Hartford Accident & Indemnity Company* v. *Bunn*, 285 U. S. 169), is not conclusive of the merits of the cause and that this appeal is not cut off thereby.

It is pertinent to review the history of appellee's relation to this cause:

There was filed in the Chancery Court of Adams County, Mississippi, a cause styled *Natchez Investment Company, Inc.*, v. *J. V. and R. T. Burkes et al.*, to which cause one A. W. Moore, the assignor of appellee, was made a party defendant under his trade name of Acme Engineering Company. That cause went to final hearing without either Moore or the appellee intervening therein, and while the Chancellor had the cause under advisement, appellee obtained an order permitting it to intervene and the final decree in that cause expressly reserved the jurisdiction of the Chancery Court of Adams County, Mississippi, for the future determination of the issue presented by appellee against the Hartford Accident & Indemnity Company. We quote from transcript No. 333, October Term, 1931, pages 65 and 66, that portion of the decree:

> "And it further appearing unto the court that N. O. Nelson Manufacturing Company as assignee of A. W. Moore, doing business as Acme Engineering Company, obtained leave of the court to intervene in this cause as a defendant and cross complainant as of right by decree rendered by the undersigned Chancellor on the 14th day of August, 1929, duly enrolled in the minutes of this court, and that said N. O. Nelson Manufacturing Company as assignee of A. W. Moore, doing business as Acme Engineering Company, thereafter pursuant to said permission intervened herein and did file its answer and cross bill of complaint seeking to recover against said J. V. & R. T. Burkes and said Hartford Accident & Indemnity Company the principal sum of five thousand nine hundred and seventeen and 53/100 ($5,917.53) dollars and interest and attorneys' fees on said sum for labor and mate-

rials furnished in and about the erection and construction of the Eola Hotel Building in Natchez, Adams County, Mississippi, being Project No. 640; and it further appearing that thereafter Hartford Accident & Indemnity Company filed a motion in this cause moving the court to strike from the files the said intervention and cross bill of complaint of said N. O. Nelson Manufacturing Company; and it further appearing that the issues as to said claim and intervention of said N. O. Nelson Manufacturing Company have not yet been heard or tried by this court, it is thereupon further ordered, adjudged and decreed that said issue as to the intervention and claim of said N. O. Nelson Manufacturing Company be continued to be heard and determined at the regular January Term, 1930, of the Chancery Court of Adams County, Mississippi, it being the intention by this order to reserve unto all parties concerned in said claim and intervention all rights and remedies they would have had not this decree been entered and rendered at this time."

In due time the motion of the appellant referred to was overruled and a demurrer filed by appellant was also overruled and an appeal taken to the Supreme Court of Mississippi, whose opinion on that appeal is found in 160 Miss. 504, 135 So. 349.

In disposing of the contention made by the Hartford Accident & Indemnity Company that appellee had intervened too late, the Supreme Court of Mississippi said:

"The court below committed no error in overruling the motion to dismiss, for, until its final decree was entered, it had full control over the procedure, and the record presents no question of prejudice to the indemnity company because of the permission given the Nelson Manufacturing Company to intervene after the case had been submitted on its merits."

On the remand of the cause the appellant, Hartford Accident & Indemnity Company, answered, raising the federal question heretofore adverted to in discussing Point One of the motion to dismiss or affirm.

It is, therefore, perfectly apparent that appellee itself has taken the position in this cause that its intervention in the Chancery Court of Adams County, Mississippi, was an independent suit, in nowise affected by any previous hearing of the case by that court nor in anywise affected by any previous decision of any court.

The citations of authority by counsel under this point are not applicable to the facts presented by this suit. There has been no appeal heard by this court on the merits. The exact converse is true. The court in *Hartford Accident & Indemnity Company* v. *Bunn,* 285 U. S. 169, declined to consider the appeal and dismissed it, not for want of a federal question but for want of the necessary parties.

It is submitted that unless there has been adjudication on the merits no element of *res adjudicata* or law of the case can be contended for as cutting off the appeal.

## POINT III.

Under this point appellee contends:

**Pleading and proof presenting exclusive or controlling federal question, condition for jurisdiction here, not in present record.**

Appellee, under this heading, raises the contention that no federal question is presented by the suit.

In the first place we are sure that if that had been true the court would not have retained jurisdiction of the

cause upon its consideration of the jurisdictional statement.

Moreover, this is the second time that the court has, upon consideration of the jurisdictional statement, held that a federal question was presented.

We believe that a consideration of the pleadings heretofore referred to in this brief demonstrates beyond all question that the federal question is amply presented in the suit. It has been presented by demurrer, and by answer in the lower court, and by appeal to the Supreme Court of Mississippi, urging the same grounds as raised by both the demurrer and the answer, and moreover, was again raised in a suggestion of error in which it was contended that the construction placed upon the statute by the court in its decisions rendered the statute unconstitutional, if not unconstitutional on its face.

The federal question in this cause did not depend upon proof but, as a matter of fact, all the proof taken on this cause is contained in an agreed statement of facts, shown in transcript 239, page 17.

## POINT IV.

Under this point appellee contends:

**If the court should hold that it has jurisdiction to review on this appeal, then that determined by the Mississippi Supreme Court was only an interpretation of a local contract in so far as this appellee was concerned.**

It is respectfully submitted that this point is utterly without merit.

If the Supreme Court of Mississippi, on any of the appeals involved in this cause, had planted itself upon the so-called contract ground a different issue might be pre-

sented but as we have heretofore observed the most casual reading of those opinions shows that the court squarely placed them upon the constitutionality of the statute attacked.

Also as heretofore stated but for the statute appellee could not have come into court much less have remained therein long enough to have obtained a decree.

Much stress is laid by appellee upon Article 30, set out at page 15 in No. 333. But what appellee overlooks is that, notwithstanding what the rights of the owner might have been to require such a bond, the fact remains that in the final analysis he did not require it but accepted a bond from the contractors which specifically negatived the right of anyone save the obligee to have any right of action thereon and appellee is not in a position to question either the right of the obligee so to do or the effect of his act in so doing.

Appellee must rely upon the statute and its constitutionality or it has no standing in court.

It is submitted that causes are to be decided not upon what persons may have done but upon what they did do, and likewise it is submitted that this appeal involves not a decision of the Supreme Court of Mississippi which it might have rendered but opinions and decisions which it did render, and those opinions and decisions are placed squarely, not upon any contract rights which the appellee had but upon the inherent constitutionality and the controlling effect of the statute attacked.

It is, therefore, submitted that the motion to dismiss or affirm should be overruled.

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